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December 3, 2014

Roger E. Johnson
Deputy Director
Siting, Transmission and
Environmental Protection Division
California Energy Commission
1516 Ninth Street
Sacramento, California 95814-5512

RE: Comments on the Final Draft California Energy Commission Tribal Consultation Policy

Dear Mr. Johnson:

Ellison, Schneider & Harris L.L.P. (“ESH”) thanks you for the opportunity to provide comments on the *Final Draft California Energy Commission Tribal Consultation Policy* (“Policy”), dated November 2014. These comments have been prepared solely on behalf of ESH, and do not represent the positions, beliefs, or views of any client.

The stated purpose of the Policy is “to ensure effective government-to-government consultation between the California Energy Commission (Energy Commission) and tribal entities”¹ as directed by California Governor’s Executive Order B-10-11, dated September 19, 2011, and the California Natural Resources Agency (Resources Agency) tribal consultation policy, dated November 20, 2012. However, the Policy does not appear to reference or incorporate the specific requirements for lead agency consultations with California Native American Tribes pursuant to the California Environmental Quality Act, which were recently enacted as part of Assembly Bill Number 52 (“AB 52”).²

For example, the Policy provides that the Energy Commission’s Tribal Liaison will mail a “Request to Consult” letter to tribal entities identified by the Native American Heritage Commission as interested in the Project Area. AB 52 provides particular requirements for the consultation process, including specific requests for formal notifications of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe, and specific

¹ *Final Draft California Energy Commission Tribal Consultation Policy*, p. 1.

² Assembly Bill No. 52 Native Americans: California Environmental Quality Act, Chapter 532 (2013-2014 Reg. Sess.).

information that should be included in the formal notification.³ The Policy also contains a section titled, “Information Confidentiality”, which describes information exchanges as a “two-way function” between Energy Commission staff and tribal entities. This section does not acknowledge that certain Energy Commission proceedings, such as siting proceedings, might require a “three-way” information exchange to include project applicants. AB 52 contains provisions that address the inclusion of project applicants and their consultants in information exchanges, in addition to other provisions addressing the handling of confidential information by a lead agency.⁴

As shown in both of the examples described above, there are elements of the Policy that do not appear to reflect the requirements of AB 52. To ensure that the Energy Commission’s consultation process is consistent with the requirements of the California Environmental Quality Act, the Policy should be reviewed against the provisions of AB 52, and revised as needed to ensure compliance with the new statutory requirements. Once revised, the Policy should be recirculated for additional public comment.

If you have any questions regarding the above comments, please do not hesitate to contact us at (916) 447-2166.

Sincerely,



Samantha G. Pottenger
Ellison, Schneider & Harris L.L.P.

³ See, Assembly Bill No. 52 Native Americans: California Environmental Quality Act, Chapter 532 (2013-2014 Reg. Sess.), § 5 (adding Section 21080.3.1 to the Public Resources Code).

⁴ See, Assembly Bill No. 52 Native Americans: California Environmental Quality Act, Chapter 532 (2013-2014 Reg. Sess.), § 7 (adding Section 21080.3.1 to the Public Resources Code).